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Supreme Court Of The United States

OCTOBER TERM — 1962.

No. 419

HOWARD JOHNSON COMPANY, *Petitioner*,

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Supreme Court Of The United States

OCTOBER TERM — 1962.

No.

HOWARD JOHNSON COMPANY, *Petitioner*,

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Howard Johnson Company prays that a writ of certiorari issue to review the decree of the Court of Appeals for the Third Circuit enforcing an Order of the National Labor Relations Board in the instant case.

Opinions Below.

The Opinion and Order of the National Labor Relations Board involved in the present case is reported at 135 NLRB 1260 under the name Howard Johnson, Inc. of New Jersey and Howard Johnson Company *and* Hotel and Restaurant Employees and Bartenders Union, Local 1, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO.

The Opinion of the Court of Appeals for the Third Circuit is not yet reported. A copy is reprinted herein, Appendix A, page 13, *infra*.

Jurisdiction of this Court.

The judgment of the Court of Appeals for the Third Circuit was entered on June 4, 1963. Jurisdiction of this Court is invoked under 28 USC Sec. 1254.

Question Presented.

Whether the Howard Johnson Company in operating the Milltown Restaurant 8N on the New Jersey Turnpike is acting as an agent of a political subdivision of the State of New Jersey, namely the New Jersey Turnpike Authority, and therefore not an employer within the meaning of Section 2(2) of the National Labor Relations Act, as amended.

Statutes Involved.

The statutes involved are the New Jersey Turnpike Authority Act of 1948, Chapter 454, P.L. 1948, as amended, and Section 2 (2) of the National Labor Relations Act, as amended. Pertinent portions of the New Jersey Turnpike Authority Act of 1948 are reprinted herein, Appendix B, page 18, *infra*. Section 2 (2) of the National Labor Relations Act, as amended, provides in pertinent part—

> "Sec. 2. When used in this Act, the . . . . . (2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly-owned Government corporation or any Federal Reserve Bank, or any State or political subdivision thereof . . . . . ".

Jurisdiction Below.

Jurisdiction of the Court of Appeals in this case is conferred by Section 10 (e) of the National Labor Relations Act, as amended.

Concise Statement of the Case.

On September 8, 1961, the General Counsel of the National Labor Relations Board, by the Acting Regional Director of the Twenty-Second Region (Newark, New Jersey), issued a complaint against Howard Johnson, Inc. of New Jersey and Howard Johnson Company, alleging a violation of Sections 8 (A) (1) and (5) of the National Labor Relations Act, as amended, hereinafter called the "Act". After a hearing, a Trial Examiner, on December 8, 1961, issued his Intermediate Report and Recommended Order (R.A. 7a - 30a). Exceptions were filed to the Intermediate Report. On February 26, 1962, a panel of the Board issued its Decision and Order adopting the findings, conclusions and recommendations of the Trial Examiner and ordering Howard Johnson Company to bargain collectively upon request with Hotel and Restaurant Employees and Bartenders Local 4, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, as the exclusive representative of the bargaining unit at the Company's Milltown Restaurant 8N:

Much of the evidence and of the findings of the Trial Examiner have to do with the relationship between Petitioner and Howard Johnson, Inc. of New Jersey, a New Jersey corporation liquidated on June 30, 1961, and with the question of whether Petitioner became a successor corporation under the circumstances and subject to the pre-

vious, obligations of the New Jersey corporation under the Act.

That question was not involved before the Court of Appeals and is not involved in the present Petition. Petitioner also argued before the Trial Examiner and before the Board that the New Jersey Turnpike Authority is a body corporate and politic established pursuant to Chapter 545 of the New Jersey laws of 1948, and as such exempt under Section 2 (2) of the Act from the Board's jurisdiction as a political subdivision of the State of New Jersey and that under the terms of Petitioner's operating agreement with the New Jersey Turnpike Authority, the Authority has retained such control that Petitioner is merely acting as its agent and is not an "employer" within the meaning of the Act. The Trial Examiner (R.A. 24a) ruled that the status of Petitioner is that of an independent contractor and not that of an agent of the Authority and subject to the jurisdiction of the Board. This ruling was affirmed by the Panel of the Board and by the Court of Appeals.

Petitioner operates the Milltown Restaurant 8N under an agreement with the New Jersey Turnpike Authority which appears at pages 104a to 124a of the Joint Appendix. This agreement recites that the Authority has constructed and owns fourteen service areas on the New Jersey Turnpike, at which areas there are facilities (including buildings, portions of buildings and equipment) for the storage, preparation, handling, service and sale of food and beverages, and the disposal of refuse and waste therefrom, together with public lobbies or lounges, public toilet rooms and, in the buildings of certain of said areas, gift shops. At the fourteen service areas, there are also facilities for the sale of gasoline, oil, and allied products and services. The Authority agrees to give to Petitioner, as operator, possession and

use of all restaurants at the service areas during the term of the agreement. The Petitioner, as operator, in turn agrees to operate the restaurants in a highly efficient and attractive manner. The Authority agrees to provide all fixed or permanent equipment, while the operator undertakes to provide all other furnishing and equipment required for the operation of the restaurants. The agreement contains a number of other provisions which will be described under the heading of Argument.

The Petitioner does not disagree with the Board's underlying findings of fact relative to the present question. It does disagree with the Board's interpretation of the Record, and particularly its interpretation of the operating agreement, to the effect that Petitioner's status is that of an Authority contractor and not that of an agent of the Authority.

Argument.

I.

The New Jersey Turnpike Authority was created by the New Jersey Turnpike Authority Act of 1948 (New Jersey Statutes Annotated, c. 27:23-1).

By Section 1, New Jersey Turnpike Authority is authorized and empowered to construct, maintain, repair and operate Turnpike projects in order to provide for the construction of modern express highways embodying every known safety device, including center divisions, ample shoulder widths, long sight distances, multiple lanes each direction and grade operations at all intersections with other highways and railroads.

Section 3 creates the New Jersey Turnpike Authority and provides, "The Authority is hereby constituted an instrumentality exercising public and essential governmental functions and the exercise by the Authority of the powers conferred by this Act in the construction, operation and maintenance of Turnpike projects shall be deemed and held to be an essential governmental function of the State."

Section 4(b) defines the word "project" and the words "Turnpike project" to include "service areas service stations, service facilities".

Section 5(1) empowers the Authority "to make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this Act:".

Section 5(m) empowers the Authority "to appoint . . . . such other employees and agents as may be necessary in its judgment".

Section 9 authorizes the Authority to contract with others for "placing" on the project "gas stations" or "restaurants" and "to fix the terms, conditions, rents and rates of charges for such use." This section adds that such "charges shall be fixed and adjusted as to carry out and perform the terms and provisions of any contract with or for the benefit of boudholders."

Section 12 provides, "The exercise of the powers granted by this act will be in all respects for the benefit of the people of the State, for the increase of their commerce and prosperity, and for the improvement of their health and living conditions, and as the operation and maintenance of projects by the Authority will constitute the performance of

essential governmental functions, the Authority shall not be required to pay any taxes or assessments upon any project or any property acquired or used by the Authority under the provisions of this act or upon the income therefrom, and every project and any property acquired or used by the Authority under the provisions of this act and the income therefrom, and the bonds or notes issued under the provisions of this act, their transfer and the income therefrom (including any profit made on the sale thereof) shall be exempt from taxation."

In *Newark* v. *New Jersey Turnpike Authority*, 7 N.J. 377, 81 A. 2nd 705, Chief Justice Vanderbilt states: "The Turnpike Authority is an independent public corporation especially created by the Legislature to carry out legitimate and important functions of Government. It is a body both corporate and politic analagous in many respects to a municipal corporation. *New Jersey Turnpike Authority* v. *Parsons*, 3 N.J. 235 (1949). Like a municipal corporation, it is vested with and enjoys a considerable degree of discretion in the manner in which it carries out its functions."

In *Bloomfield* v. *New Jersey Highway Authority*, 18 N.J. 237, 113 A. 2nd 658, it was held that under legislation authorizing the New Jersey Highway Authority to construct, maintain, repair and operate a project known as Garden State Parkway, the Authority was not subject to local zoning and building requirements in construction of service areas. The Court noted the success of the earlier New Jersey Turnpike Authority Act and noted the similarity of the legislation creating the New Jersey Highway Authority. The Court states, at page 245, "The operation of the 165 mile limited access highway itself, as a revenue-financed facility is admittedly a proper governmental

function and merely incidental thereto are the various subordinate operations (including the service areas) are appropriate and necessary for the satisfactory fulfillment of the social objectives . . . . It matters not whether these subordinate operations, considered alone, cross the shadowy line between governmental and proprietary functions for, in either event, they constitute a proper public use." Under these circumstances, there can be no doubt that the New Jersey Turnpike Authority is a political subdivision of the State of New Jersey and hence not an "employer" under Section 2 (2) of the Act. The Board so ruled in *New Jersey Turnpike Authority*, decided April 16, 1954 and reported in 33 LRRM 1528, but not in the official reports of the Board.

Thus it is clear that if the New Jersey Turnpike Authority operated the restaurants directly, the restaurant employees would not be covered by the Act. The result, we submit, is no different, where the Authority chose to operate the restaurants indirectly by use of Petitioner as an agent in the manner done in the present case.

In *Labor Board* v. *Atkins & Co.*, 331 U.S. 398, this Court, speaking in relation to the question of when an employer-employee relationship may be found to exist under the Act, at page 413, said:

> "As we have seen, judgment as to the existence of such a relationship for purposes of this Act must be made with more than the common law concepts in mind. That relationship may spring as readily from the power to determine the wages and hours of another, coupled with the obligation to bear the financial burden of those wages and the receipt of the benefits of the hours worked, as from the absolute power to hire and fire or the power to control all the activities of the worker. In other words,

where the conditions of the relation are such that the process of collective bargaining may appropriately be utilized as contemplated by the Act, the necessary relationship may be found to be present." (Emphasis supplied.)

An examination of Petitioner's operating agreement shows that so many elements of control are retained by the Authority that the normal process of collective bargaining would be inappropriate, if not impossible, to use.

Petitioner is required to operate the restaurants 24 hours of each day unless under limited circumstances the Authority approves operation of a specified restaurant unit on less than such 24-hour basis (R.A. 111a).

The range of prices charged for food, beverages, merchandise and services sold or rendered "shall be reasonably suited to the traveling public at large and shall be in keeping with prices charged for comparable food, beverages, merchandise and services sold in areas in the general vicinity of the Turnpike". (R.A. 115a)

Most importantly, Section 22(d) of the agreement (R.A. 121a) provides that in the event Petitioner is unable on account of strike or other labor difficulties to carry on the proper operation of the Turnpike restaurants, or any of them, then the Authority may take charge of the restaurant or restaurants in question and have it or them operated in any manner it deems advisable.

Manifestly, ordinary collective bargaining would be impossible under such circumstances since the Authority retains the right at any time to step in and take over the restaurants in the event of any disagreement between Petitioner and a union. By means of this provision, par-

ticularly coupled with the Authority's retained right to control prices and hours, the Authority has effectively retained control of all labor relations at the restaurants. Thus the case differs in material degree from those cited by the Court of Appeals.

But the Authority retains effective control not only of labor relations, but in many other areas relating to the operation of these restaurants, as it properly should in the exercise of its governmental functions. For example, in Section 22(a), (R.A. 120a), it is provided, "The standard of operation of the restaurants on the New Jersey Turnpike is of utmost importance to the New Jersey Turnpike Authority. Therefore, all the terms of this agreement shall be considered as both covenants and conditions and the agreement may be terminated by the Authority for any breach thereof." This means that the Authority retains the right to terminate the agreement, among other things, for breach of any one of the detailed undertakings of Petitioner found in Section 10, entitled "Housekeeping" (R.A. 114a-115a). Thus the Authority has retained the right to control the manner in which the Petitioner and the restaurant employees operate the restaurants down to the smallest details.

In cases involving the distinction between the employer-employee relationship and that of an independent contractor, it has often been held that it is the right and not the exercise of control which is the determining element. *Williams* v. *United States*, 126 F. 2d 129, 132. C.A. 7, 1942. *NLRB* v. *Phoenix Mutual Life Ins. Co.* 167 F. 2d 983, 986. C.A. 7, 1948. *National Van Lines, Inc.* v. *NLRB*, 273 F. 2d 402, 405. C.A. 7, 1960. The same principle is applicable here.

If the interpretation given by the Court of Appeals to Section 2 (2) is correct, then the coverage of these employees depends solely on whether the Turnpike Authority chooses to operate these restaurants itself or through Petitioner, or whether or not it exercises its rights under the agreement to take over operation of them for any of the circumstances under which it has a right to do so. This cannot have been the intention of Congress.

We submit that where the Authority has retained such extensive right to control, including effective control of labor relations, Petitioner must be regarded merely as the Authority's agent for operating these restaurants in the performance of the Authority's governmental functions, and Petitioner cannot be regarded as a matter of law as an employer within the meaning of Section 2 (2) of the Act.

II.

The position of Petitioner in the present case is entirely different from the usual case of a private corporation doing work under a contract with an agency of the Government. The nature of the services performed, the places where they are performed, and the nature and extent of the right of control reserved to the Authority make the case unique. As a result, this case raises an important question of Federal law which has not been but should be decided by this Court. There has been a rapid increase in the number of express highways such as the New Jersey Turnpike in recent years. All require service facilities such as are involved in the present case. Consequently the question here presented is an important one in the administration of the Act. It is also an important question for those agencies of the States which are charged with responsibility for

operation of these express highways. It is an important question for those who may be employed to assist such agencies in carrying out their important governmental functions. It is a question which should be decided by this Court.

Respectfully submitted,

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Appendix A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,063

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,
v.
HOWARD JOHNSON COMPANY, *Respondent*.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued January 22, 1963

Before STALEY and SMITH, *Circuit Judges* and SHAW, *District Judge*.

OPINION OF THE COURT
(Filed May 15, 1963)

By STALEY, *Circuit Judge*.

The sole question presented by this case is whether respondent Howard Johnson Company in operating a restaurant on the New Jersey Turnpike acts in the capacity of a "state or political subdivision thereof" and is therefore not an "employer" as that term is defined in the National Labor Relations Act.[1] Respondent does not challenge the Board's finding of a refusal to bargain with

[1] "§ 152. Definitions
"When used in this subchapter—
* * *
"(2) The term 'employer' * * * shall not include * * * any state or political subdivision thereof * * *." 29 U.S.C.A. §152.

the certified representative of its employees, but urges that under the terms of its operating agreement with the New Jersey Turnpike Authority the latter has retained such control over the enterprise that respondent is merely its agent or alter ego.

The Board found that the restaurant employees are "hired and fired and paid by the Respondent * * * and under its direction, control and supervision * * *." Respondent does not challenge that finding in this court but, as previously indicated, points to various provisions of the operating agreement which it says show that the Authority, as an arm of the State of New Jersey, controls the operation of the restaurant.

We agree with respondent that the element of control of the enterprise is important in deciding the issue before us, but we think control of the employment relationship is of paramount significance. As succinctly put by the Board in an earlier case, "The decisive elements in establishing an employer-employee relationship are complete control over the hire, discharge, discipline, and promotion of employees; rates of pay, supervision, and determination of policy matters." Roane-Anderson Co., 95 N.L.R.B. 1501, 1503 (1951). This is in accord with the analysis of the Supreme Court in NLRB v. E. C. Atkins & Co., 331 U.S. 398 (1947), where the Court said:

> "The crucial problem in this case, however is whether the militarization of the plant guards changed their status as employees as a matter of law so as to prohibit the Board from extending to them the benefits of the Act which they would otherwise have. The short answer to that problem is that militarization as such does not necessarily change the status of plant guards. It may or may not bring about a change, depending upon the particular

circumstances. The militarization may be a qualified one; the employer may retain power to fix wages, hours and other conditions of work; the need and desirability for collective action on the part of the guards may exist as to the matters over which the employer retains control; and a recognition of the statutory rights of the guards may be entirely consistent with their military obligations. If that is the case the guards remain employees for purposes of the Act. But if the militarization is such as to transfer to the Army all the matters over which the employer would normally have control, matters which would form the basis for collective bargaining as contemplated by the Act, the guards may lose their status as private employees within the purview of the statute." 331 U.S. at 405-406.

Moreover, as stated by the Court in that case, the Board's determination must be accepted if supported by the evidence and consistent with the law.

We think an application of these principles to the facts of this case compels the conclusion that respondent operates its restaurant as an independent contractor of the Authority, and has retained such control over the elements of the employment relationship that it is an "employer" within the meaning of the Act.

To support its position respondent cites, among others,[2] the following provisions of the agreement:

(1) Respondent must operate on a 24 hour basis unless the Authority approves a more limited operation.

[2] Respondent cites numerous other terms of the agreement the relevance of which is at best *de minimis* to the determination of the issue. These include the fact that the Authority controls the approaches to the restaurant and approves the decoration and redecoration of the interiors.

(2) Respondent must make ample provision for speedy and convenient handling of patronage during all hours.

(3) The Authority may take charge and operate the restaurant if respondent is unable to do so because of a "strike or other labor difficulties."

(4) The range of prices for food, beverages, merchandise and services shall be comparable to the prices charged in the general vicinity of the turnpike.

(5) The agreement defines what constitutes gross sales.

(6) The buildings and substantially all of the equipment are owned by the Authority.

(7) The Authority may terminate the agreement upon the failure of respondent to remedy any unsatisfactory condition, including quality of service, efficiency, cleanliness, safety, and sanitation.

(8) The Authority has the right to inspect and audit respondent's records.

We think that these provisions, whether viewed individually or in their totality, do not impair the Board's finding that respondent is an independent contractor and not an agent of the Authority. None of them manifest an attempt by the Authority either to control the relationship between respondent and the restaurant workers or to impose terms and conditions of employment. On the contrary, the clause providing for the operation of the restaurant by the Authority in the event of a "strike or other labor difficulties" constitutes a recognition that the workers are employees of respondent and not state employees. If the parties considered them to be state employeess, the clause would be meaningless in its context, for under New Jersey law such employees do not possess the right to strike. Donevero v. Jersey City Incinerator Authority, 75 N.J. Super. 217, 182 A.2d 596 (1962).

Nor do the other provisions cited by respondent provide any support for its argument. Rather than establishing Howard Johnson Company as the alter ego of the state, they appear to be nothing more than standard conditions which one in the position of the Authority would include in an agreement with an independent contractor for the efficient, orderly operation of a turnpike restaurant. Certainly they are not inconsistent with the independent contractor status implicit in the admitted fact that it is Howard Johnson which hires, fires, supervises, controls, and directs the restaurant employees. In N.L.R.B. v. E. C. Atkins & Co., 331 U.S. 398, even evidence of some control by the Federal Government over these decisive elements was held insufficient to negate the employer-employee relationship. Further support for our conclusion can be found in N.L.R.B. v. Carroll, 120 F. 2d 457 (C.A.1, 1941).

Respondent also refers to Site Oil Co. of Missouri, 137 N.L.R.B. No. 145 (1962). However, that proceeding merely emphasizes that each case depends upon an assessment of its particular facts. There the Board concluded that the lessor of a gasoline station exercised such control over all aspects of the lessee's operations that the latter was its employee and not an independent contractor.

The order of the Board will be enforced and a form of decree may be submitted.

A TRUE COPY:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix B.

Title 27 — New Jersey Statutes Annotated.

27:23-1. Turnpike projects.

In order to facilitate vehicular traffic and remove the present handicaps and hazards on the congested highways in the State, and to provide for the construction of modern express highways embodying every known safety device including center divisions, ample shoulder widths, long-sight distances, multiple lanes in each direction and grade separations at all intersections with other highways and railroads, the New Jersey Turnpike Authority (hereinafter created) is hereby authorized and empowered to construct, maintain, repair and operate turnpike projects (as hereinafter defined) at such locations as shall be established by law, and to issue turnpike revenue bonds of the Authority, payable solely from tolls, other revenues, and proceeds of such bonds to finance such projects. L. 1948, c. 454, p. 1856, § 1, as amended L. 1950, c. 1, p. 12 § 2.

27:23-3. New Jersey Turnpike Authority.

There is hereby established in the State Highway Department a body corporate and politic, with corporate succession, to be known as the "New Jersey Turnpike Authority." The Authority is hereby constituted an instrumentality exercising public and essential governmental functions, and the exercise by the Authority of the powers conferred by this act[1] in the construction, operation and maintenance of turnpike projects shall be deemed and held to be an essential governmental function of the State.

* * *

L. 1948, c. 454, p. 1858, § 3, as amended L. 1952, c. 35, p. 125, § 1.

[1]Sections 27:23-1 to 27:23-22 effective April 16, 1952.

27:23-4. DEFINITIONS.

As used in this act, the following words and terms shall have the following meanings, unless the context shall indicate another or different meaning or intent:

* * *

(b) The word "project" or the words "turnpike project" shall mean any express highway, superhighway or motorway at such locations and between such termini as may hereafter be established by law, and constructed or to be constructed under the provisions of this act by the Authority, and shall include, but not be limited to all bridges, tunnels, overpasses, underpasses, interchanges, entrance plazas, approaches, toll houses, service areas, service stations, service facilities, communications facilities, and administration, storage and other buildings which the Authority may deem necessary for the operation of such project, together with all property, rights, easements and interests which may be acquired by the Authority for the construction or the operation of such project.

* * *

27:23-5. GENERAL GRANT OF POWERS.

The Authority shall be a body corporate and politic and shall have perpetual succession and shall have the following powers:

* * *

(l) To make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this act;

(m) To appoint such additional officers, who need not be members of the Authority, as the Authority deems advisable, and to employ consulting engineers, attorneys, accountants, construction and financial experts, superintendents, managers, and such other employees and agents

as may be necessary in its judgment; to fix their compensation; and to promote and discharge such officers, employees and agents; all without regard to the provisions of Title 11 of the Revised Statutes;

* * *

(o) To do all acts and things necessary or convenient to carry out the powers expressly granted in this act. L. 1948, c. 454, p. 1860, § 5, as amended L. 1950, c. 1, p. 14, § 5.

27:23-9. REVENUES.

The Authority is hereby authorized to fix, revise, charge and collect tolls for the use of each turnpike project and the different parts or sections thereof, and to contract with any person, partnership, association or corporation desiring the use of any part thereof, including the right-of-way adjoining the paved portion, for placing thereon telephone, telegraph, electric light or power lines, gas stations, garages, stores, hotels, and restaurants, or for any other purpose except for tracks for railroad or railway use, and to fix the terms, conditions, rents and rates of charges for such use; *provided*, that a sufficient number of gas stations may be authorized to be established in each service area along any such highway to permit reasonable competition by private business in the public interest; *and provided further*, that no contract shall be required, and no rent, fee or other charge of any kind shall be imposed, for the use and occupation of any turnpike project for the installation, construction, use, operation, maintenance, repair, renewal, relocation or removal of tracks, pipes, mains, conduits, cables, wires, towers, poles or other equipment or appliances in, on, along, over or under any such turnpike project by any public utility as defined in section 27:7-1 of the Revised Statutes which is subject to taxation pursuant to either

chapter four of the laws of 1940, as amended (R.S. §§ 54:31-15.14 et seq.), or chapter five of the laws of 1940, as amended (R.S. §§ 54:31-45 et seq.), or pursuant to any other law imposing a tax for the privilege of using the public streets, highways, roads or other public places in this State. Such tolls shall be so fixed and adjusted as to carry out and perform the terms and provisions of any contract with or for the benefit of bondholders. Such tolls shall not be subject to supervision or regulation by any other commission, board, bureau or agency of the State. The use and disposition of tolls and revenues shall be subject to the provisions of the resolution authorizing the issuance of such bonds or of the trust agreement securing the same. L. 1948, c. 454, p. 1867, § 9.

27:23-12. Exemption from taxation.

The exercise of the powers granted by this act[1] will be in all respects for the benefit of the people of the State, for the increase of their commerce and prosperity, and for the improvement of their health and living conditions, and as the operation and maintenance of turnpike projects by the Authority will constitute the performance of essential governmental functions, the Authority shall not be required to pay any taxes or assessments upon any turnpike project or any property acquired or used by the Authority under the provisions of this act or upon the income therefrom, and any turnpike project and any property acquired or used by the Authority under the provisions of this act and the income therefrom, and the bonds issued under the provisions of this act, their transfer and the income therefrom (including any profit made on the sale thereof) shall be exempt from taxation. L. 1948, c. 454, p. 1869, § 12.

[1] Sections 27:23-1 to 27:23-22.

Appendix C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
HOWARD JOHNSON COMPANY,
Respondent.
No. 14063

DECREE

Before: Staley and Smith, Circuit Judges, and Shaw, District Judge

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent on February 26, 1962. The Court heard argument of respective counsel on January 22, 1963, and has considered the briefs and transcript of record filed in this cause. On May 15, 1963, the Court, being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Third Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Howard Johnson Company, its officers, agents, successors and assigns, abide by and perform the directions of the Board in said order contained.

BY THE COURT

STALEY
Circuit Judge

DATED: June 4, 1963

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 419

HOWARD JOHNSON COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 13-17) is not yet reported. The Decision and Order of the National Labor Relations Board (J.A. 2a-30a)[1] are reported at 135 NLRB 1260.

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[1] "J.A." references are to the Joint Appendix in the court below.

JURISDICTION

The decree of the court of appeals was entered on June 4, 1963 (Pet. 22). The petition for a writ of certiorari was filed on August 30, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that petitioner, in operating a restaurant on the New Jersey Turnpike, is an "employer" within the meaning of Section 2(2) of the National Labor Relations Act, and not exempt as an instrumentality of the State of New Jersey.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136; 29 U.S.C. 151 *et seq.*) are set forth at page 2 of the petition.

STATEMENT

On April 11, 1961, following a consent election, the Board certified the Union[1] as the collective bargaining representative of employees at the Howard Johnson restaurant on the New Jersey Turnpike near Milltown, New Jersey (J.A. 13a-14a, 84a-85a). Petitioner refused to bargain with the Union on the

[1] Hotel and Restaurant Employees and Bartenders Union, Local 4, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO.

ground, *inter alia*, that, in operating the restaurant, it was an agent of the State of New Jersey and was thus not an "employer" within the meaning of Section 2(2) of the Act. These are the pertinent facts.

The Howard Johnson restaurants on the New Jersey Turnpike are operated in facilities owned by the New Jersey Turnpike Authority, an instrumentality of the State of New Jersey (Pet. 5-8, 18-21; J.A. 104a-125a, 127a-130a). Under the operating agreement, the Authority provides the buildings and all permanent equipment, while petitioner provides all other equipment and furnishings necessary for the operation of the restaurants (J.A. 108a-109a). The agreement requires petitioner to operate the restaurants 24 hours a day, in an "attractive, clean, safe and sanitary manner," serving meals "reasonably suited to the traveling public at large," at prices "comparable" to those charged in the general vicinity of the Turnpike (J.A. 114a-115a). The agreement further requires petitioner to "comply with all applicable governmental laws and regulations respecting the safety, health, sanitary codes and employment, and all other statutory provisions that may be applicable" (J.A. 119a). However, restaurant employees are hired, fired and paid by petitioner, and are under its direction, control and supervision (J.A. 24a, 34a-37a, 39a-40a, 70a-71a, 87a, 126a).

Based on these facts, the Board concluded that petitioner retained sufficient control over employment conditions at the Turnpike restaurant to make it an "employer" within the meaning of the Act (J.A.

24a). Accordingly it ordered petitioner to bargain with the Union (J.A. 2a-3a).

The court of appeals sustained the Board's holding and enforced its order (Pet. 13-17).

ARGUMENT

The decision of the court of appeals is correct, and there is no conflict of decisions. No issue warranting review by this Court is presented.

Section 2(2) of the Act excludes from the category of employers subject to the Act "any State or political subdivision thereof." [3] The sole question presented is whether petitioner, in operating the Milltown restaurant on the New Jersey Turnpike, acts as a private employer or as an agent of the Turnpike Authority, an instrumentality of the State of New Jersey. In *National Labor Relations Board* v. *E. C. Atkins & Co.*, 331 U.S. 398, this Court pointed out that the decisive inquiry is whether the private party retains control over "wages, hours, and other terms and conditions of employment," or whether he has transferred to the government "all the matters over which the employer would normally have control, matters which would form the basis for collective bargaining as contemplated by the Act" (pp. 405-406). In the former case, the employees are entitled to the protection of the Act, while in the latter case they may lose it.

Petitioner does not contest the validity of the prin-

[3] Section 2(3) in turn excludes from the definition of "employee" any individual employed by any "person who is not an employer as herein defined."

ciple stated in *Atkins*, but merely complains about its application to the facts of this particular case. This Court does not normally review such factual issues. In any event, the record fully supports the Board's conclusion that in the operation of the Turnpike restaurant petitioner was acting as an employer under the Act.

Petitioner accepts (Pet. 5) the Board's finding, approved by the court below (J.A. 24a; Pet. 14), that the restaurant employees are "hired and fired and paid by the [petitioner] . . . and under its direction, control and supervision . . . ." This finding, without more, justifies the conclusion of the court of appeals that petitioner "operates its restaurant as an independent contractor of the Authority, and has retained such control over the elements of the employment relationship that it is an 'employer' within the meaning of the Act" (Pet. 15). A contrary conclusion is not required by the fact that Section 22(d) of the operating agreement with the Authority (J.A. 121a) permits the latter to operate the restaurant for its own account in the event the private operator "is unable because of a strike or other labor difficulties" to carry on proper operations. As the court below observed (Pet. 16), this clause "constitutes a recognition that the workers are employees of [petitioner] and not state employees. If the parties considered them to be state employees, the clause would be meaningless in its context, for under New Jersey law such employees do not possess the right to strike." Nor is state control over the employment relation established by the provisions of the operat-

ing agreement which require petitioner to operate 24 hours of each day, and to serve food of good quality at reasonable prices. As the court below said (Pet. 17), "they appear to be nothing more than standard conditions which one in the position of the Authority would include in an agreement with an independent contractor for the efficient, orderly operation of a turnpike restaurant." This degree of governmental control is far more tenuous than that in other cases where a private employer-employee relation has been sustained. See *National Labor Relations Board* v. *E. C. Atkins & Co.*, 331 U.S. 398; *National Labor Relations Board* v. *Carroll*, 120 F. 2d 457 (C.A. 1).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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